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558-810—74——1

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1719

ARTHUR PONZIO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 73-1759

WILLIAM SOMERS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 73-6628

KARLOS R. LA SANE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. Apps.) is reported at 496 F. 2d 723.

JURISDICTION

The judgment of the court of appeals was entered on March 27, 1974. A petition for rehearing filed on behalf of petitioner Somers was denied on April 22, 1974. Petitioners La Sane, Ponzio and Somers filed their petitions for writs of certiorari on April 26, 1974, May 17, 1974, and May 22, 1974, respectively. Petitioner Ponzio's petition is out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether remarks of the prosecutor during trial denied petitioners a fair trial.

2. Whether petitioner Somers was effectively denied his rights to indictment by grand jury and to be informed of the charges against him by the variance between the time mentioned in one count of the indictment and the proofs at trial.

3. Whether petitioner La Sane's conviction for extorting money was supported by the evidence.

4. Whether the court of appeals' failure to discuss petitioner La Sane's miscellaneous contentions requires that he be granted a new trial.

STATEMENT

A federal grand jury in the District of New Jersey returned a 26-count indictment against petitioners and co-defendants Jackson, Glass, Fisher and Clark. Count 1 of the indictment charged the seven defendants with conspiring to violate the Hobbs Act (18 U.S.C. 1951) by obtaining through extortion the

property of contractors, engineers, suppliers, property owners and licensees who dealt with the City of Atlantic City, New Jersey. Count 2 charged the seven defendants with conspiring to violate the Travel Act (18 U.S.C. 1952) by utilizing the facilities of interstate commerce to cause the commission of bribery and extortion in violation of New Jersey law. Counts 3, 5, 7, 9, 11, 13, 15, 17 and 19 through 26 charged that the seven defendants, in furtherance of the conspiracy alleged in Count 1, obtained sums of money by extortion from designated businesses engaged in interstate commerce. Counts 4, 6, 8, 10, 12, 14, 16 and 18 charged that the seven defendants, in furtherance of the Travel Act conspiracy, obtained by extortion sums of money delivered to Atlantic City firms from states other than New Jersey.

During the trial co-defendants Jackson and Glass pleaded guilty to Count 1 and Clark entered a plea of *nolo contendere* to Count 1. On the government's motion, Counts 4, 5, 23 and 24 were dismissed at the close of the prosecution's case. The jury found petitioner Somers guilty on Count 26, petitioner Ponzio guilty on Counts 1, 2 and 5–18, petitioner La Sane guilty on Counts 1, 2, 21 and 22, and co-defendant Fisher guilty on Counts 1, 2, 5–8, 17 and 18. Somers was sentenced to a term of imprisonment for two and one-half years on Count 26; Ponzio was sentenced to concurrent terms of imprisonment for six years on Count 1 and five years on the remaining counts on which he was convicted; and La Sane was sentenced to concurrent terms of imprisonment for four years

on the four counts on which he was convicted.[1] The court of appeals affirmed (Ponzio Pet. App. 1a–38a; Somers Pet. App. 1a–42a).

At trial the government demonstrated a conspiracy in which Atlantic City public officials exacted kickbacks from businessmen who were anxious to receive favorable treatment from purchasing and licensing departments of the city government. The alleged conspirators held high offices in the city government: two Mayors (Jackson and petitioner Somers), two Commissioners of Parks and Public Property (petitioner La Sane and unindicted co-conspirator Albert Shahadi), a Director of Public Works, who had previously served as Director of Revenue and Finance (petitioner Ponzio), a Superintendent of Airports, Parks and Recreation Areas (Glass), an Executive Secretary to the Director of Public Works (Fisher), and an Assistant Purchasing Agent (Clark).

The facts, which are also set forth in the opinion of the court of appeals, demonstrated that payoffs were accomplished in several different ways. Several witnesses testified that certain of the defendants demanded annual payments in return for a promise of continued business from the city. Other witnesses described an elaborate scheme in which certain defendants would ascertain the price of equip-

[1] Fisher was sentenced to concurrent terms of imprisonment for two years on the eight counts on which he was convicted. Jackson was sentenced to a term of imprisonment for three years on Count 1; Glass was sentenced to a term of imprisonment for two years on Count 1; and Clark was sentenced to two years' probation on Count 1 with imposition of sentence suspended.

ment and then suggest that the price be inflated to include the amount of the kickback. Upon receipt of payment, the seller would pay back a portion of the total price (normally 10 percent), in cash, to the official involved. In order to preserve the outward manifestations of a legitimate municipal bidding structure, the seller would be instructed to draw up the specifications (subsequenty published by the city) in such a way that only its equipment would qualify. This tactic normally screened out competitors who were unwilling to pay kickbacks. In certain rare instances when "noncomplying" bids were initially submitted with "complying" bids, all bids were rejected. Thereafter, the "complying" bids alone were resubmitted and were accepted. One witness testified that in one instance, a substantial payoff was demanded in return for favorable treatment on a license application. Specific examples as to the petitioners are described below.

A. James McCormick, sales manager of State Equipment Corporation of Montgomeryville, Pennsylvania, testified that the city awarded him contracts only when he was willing to make kickbacks to petitioner Ponzio. On two occasions when he was not willing to make kickbacks his low bids were thrown out, and on one occasion Ponzio withheld his city check until McCormick delivered a $4,000 cash kickback to him (Tr. 1155, 1173–1179).[2]

Robert Brandon of Service Supply Corporation, also a Pennsylvania company, testified that he sub-

[2] "Tr." refers to the transcript of the three-month trial, a copy of which is being lodged with the Clerk.

mitted to Ponzio's demand for a kickback on a $75,000 compactor for the city's land fill project because the machine had gone through a demonstration period at the land fill site, and unless purchased by the city it would have to be sold elsewhere as a piece of used equipment at a substantially lower price. As a result of Ponzio's acts, Brandon testified that he never again solicited business from Atlantic City (Tr. 10–35, 240).

B. Angelo Cibbotti, a member of the Atlantic City Police Department, introduced Herbert Wernikove and Daniel Marino of East Coast Sales Demonstration, Inc., to Ruben Schwartz in Schwartz's office in the Atlantic City Hall. Wernikove and Marino told Schwartz they would pay him $1,000 for his assistance in obtaining a license to open a "jam joint"[3] on the boardwalk. They also told Schwartz that "the Commissioner [would get] * * * some money too" (Tr. 1786–1787). Schwartz then saw petitioner Somers, the acting Mayor, and told him that two men wanted to see him about a license for an auction. But Schwartz never relayed Wernikove's offer of money to Somers because Somers interrupted him and told Schwartz he wanted "[nothing] to do" with jam joints (Tr. 1787); when Wernikove and Marino themselves went in to see Somers they did not repeat their offer, but merely expressed their desire to open an auction on the boardwalk. It was Somers who first demanded money in return for issuing the license. He told Wernikove and Marino that they could not afford the license and that

[3] A jam joint is a place where an auction is set up in such a way that people are conned into paying more for goods than they are actually worth.

it would cost them $10,000. At that point Wernikove offered $3,000, but Somers rejected that amount. Somers eventually took $5,000 in return for issuing the license (Tr. 1699–1704).

C. Charles Moore of West Side Lumber Company testified that from 1964 through 1970 he paid unindicted co-conspirator Commissioner Shahadi $11,000 in order to continue doing business with the city. The money was collected for Shahadi by co-defendant Glass (Tr. 1296–1305, 1311). When Shahadi died in 1969, Glass was working for petitioner La Sane, Shahadi's successor, and the same procedure continued. Subsequently La Sane ordered $567.10 of supplies from Moore (Tr. 1316–1317). Moore sent La Sane one notice requesting payment but was afraid to press La Sane for payment for fear of losing business from the city (*ibid*). La Sane never paid the bill although he claimed to have paid Moore during the course of a personal conversation (Tr. 1318).[4]

ARGUMENT

1. Each of the petitioners contends that he was denied a fair trial as a result of allegedly prejudicial comments made by the prosecutor during the trial (Ponzio Pet. 5–10; Somers Pet. 13–16; La Sane Pet. 2). These contentions were thoroughly considered and properly rejected by the court of appeals, on whose opinion we rely (Ponzio Pet. App. 19a–31a; Somers Pet. App. 21a–33a). The court of appeals divided

[4] The bill was paid personally by Moore's father-in-law (Tr. 1317). La Sane subsequently sent a check for $30 to West Side Lumber (Tr. 1318, 1322–1325).

petitioners' objections into four categories: opening argument, statements made during trial, remarks made during the defense's closing argument, and the closing argument. In each instance the court of appeals ruled that, while the prosecutor's conduct was not beyond criticism, it was not of such a nature, given the specific circumstances of the case and length of the trial, as to require a new trial. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 237–243; *Donnelly* v. *DeChristoforo*, No. 72–1570, decided May 13, 1974. Moreover, even if the court of appeals was correct in characterizing the prosecutor's remarks as improper, it rightly held that the trial court's instructions were sufficient to protect petitioners from any prejudice. See *United States* v. *Reid*, 410 F. 2d 1223, 1228 (C.A. 7); *Keeble* v. *United States*, 347 F. 2d 951, 956 (C.A. 8), certiorari denied, 382 U.S. 940.[5]

2. Petitioner Somers contends that the variance between the indictment and the proofs at trial effectively denied him his right to indictment by grand

[5] Petitioners Somers and Ponzio suggest that this was one of a rash of cases in which the court of appeals has found the prosecutors involved in this case guilty of misconduct and that the particular prosecutor involved here was made the United States Attorney and was commended by the Department of Justice, notwithstanding the court of appeals' comments on his conduct. In fact, most of the other cases of misconduct cited by the court of appeals involved other districts, and the prosecutor was commended by the Department and was named as United States Attorney by the judges of the district court prior to the decision of the court of appeals in this case. The subsequent presidential appointment of the prosecutor to the same position took effect only after his confirmation by the Senate following hearings at which his fitness could be questioned.

jury and to be informed of the charges against him (Somers Pet. 8–13). This contention was also rejected by the court of appeals, upon whose opinion we rely (Somers Pet. App. 34a–42a).

The time variance in question involved Count 26 of the indictment, which charged that the seven defendants extorted money from East Coast Sales Demonstration, Inc. The fifth paragraph in the indictment alleged that the extortion occurred "between on or about January 1, 1970 and July 31, 1970." At trial, however, Wernikove testified that in late 1968 Somers told him that it would cost $10,000 to obtain a boardwalk license for a jam joint and the $5,000 payoff was finally made in early 1969. Due to problems encountered in renting building space, East Coast's jam joint was not opened until April 1970. At the close of Wernikove's testimony, Somers' counsel moved to strike his testimony on the grounds that the proof was inconsistent with the indictment. The district court denied Somers' motion on the ground that no prejudice was shown.

Stirone v. *United States,* 361 U.S. 212, relied upon by Somers (Somers Pet. 9–10), is inapposite, while the court of appeals' earlier decision in *United States* v. *Critchley,* 353 F. 2d 358 (C.A. 3), also cited by Somers (Somers Pet. 10–13), was found by that court in its opinion in this case not to be controlling (Somers Pet. App. 38a–40a). In *Stirone* the indictment charged a Hobbs Act offense relating to interference with the interstate transportation of sand. Both the proof at trial and jury instructions permitted conviction on an alternate theory (*i.e.,* interfer-

ence with shipments of concrete to a mill that would eventually produce steel which would move in interstate commerce). In finding this variance to be reversible error, this Court emphasized that the variance related to one of the essential elements in a Hobbs Act offense, the relationship to interstate commerce. 361 U.S. at 218. Here, by contrast, the variance related not to the substance of the offense but only to the dates involved. As the court of appeals emphasized, time, unlike interstate commerce, was not an essential element of either a Hobbs Act or a Travel Act offense. In *Critchley* the grand jury accused the defendants of committing extortionate acts on two specific dates, and the proof at trial showed different dates. Here the grand jury made no such specific allegations as to time. In addition, the court of appeals specifically found that Somers' defense was not prejudiced by the variance (Somers Pet. App. 40a–42a).

3. Petitioner La Sane contends (Pet. 2–3) that his conviction on Counts 21 and 22 for extorting money from West Side Lumber Company was not supported by the evidence. This contention is without merit, since, viewed in the light most favorable to the government (see *Glasser* v. *United States,* 315 U.S. 60, 80), the evidence, as described above in the Statement (*supra,* p. 7) was sufficient to implicate La Sane in a scheme to extract bribes and personal services from the company in return for contracts with the city.

4. Petitioner La Sane claims that the court of appeals failed to deal fully with his contentions (a) that the evidence was insufficient to support either the existence of a single conspiracy or his participation in

it, and (b) that his case should have been severed from that of the other defendants (La Sane Pet. 2).[6] La Sane does not, however, appear to raise the substantive issues themselves before this Court.[7] In any event, his claim is without merit. Both contentions were dealt with by the court of appeals, which briefly indicated that it rejected petitioner's first contention (Ponzio Pet. App. 6a, n. 6), and held, after a lengthy discussion, that the contentions concerning severance were without merit (Ponzio Pet. App. 6a–12a; Somers Pet. App. 7a–13a). See *Schaffer* v. *United States*, 362 U.S. 511, 513–517. Moreover, there is no requirement that the court of appeals deal extensively with every issue raised by a defendant, no matter how frivolous. *Taylor* v. *McKeithen*, 407 U.S. 191, 194, n. 4.

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[6] Petitioner La Sane did not independently raise the issue of severance below. He did, however, incorporate by reference all issues raised by the other defendants. The issue of severance was raised below by Somers and Fisher. While the court of appeals stated that its textual analysis was directed at Somers and Fisher—who had independently raised the issue—it also specifically stated that its conclusions applied to all appellants (see Ponzio Pet. App. 6a–7a, n. 7; Somers Pet. App. 7a, n. 7).

[7] While he states that he adopts in his petition for a writ of certiorari "[e]ach of the grounds cited in the brief on behalf of said Defendant-Appellant filed in the United States Court of Appeals for the Third Circuit" (La Sane Pet. 2), petitioner La Sane's failure to elaborate on those grounds makes a response unnecessary. See *Walker Transp. Co.* v. *Neylon*, 396 F. 2d 558, 562–563 (C.A. 8); cf. Rule 23(1)(h) and (j) (3) and (4) of the Rules of this Court.

CONCLUSION

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

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